

**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress
Washington, D.C.**

In re

**DETERMINATION OF RATES AND TERMS
FOR MAKING AND DISTRIBUTING
PHONORECORDS (Phonorecords III)**

**Docket No. 16-CRB-0003-PR
(2018-2022) (Remand)**

**WRITTEN SUPPLEMENTAL REMAND TESTIMONY OF JONATHAN BARNES
(On behalf of Pandora Media, LLC)**

INTRODUCTION

1. My name is Jonathan Barnes. I am the Head of Label Licensing for Pandora Media, LLC (“Pandora”). I joined Pandora in February 2016 as Manager, Artist and Label Licensing. I was promoted to Senior Manager, Artist and Label Licensing in October 2017, and I have served in my current role since May 2018. I have been closely involved in the negotiation and implementation of the terms of Pandora’s licenses with record companies since I joined the company. Prior to joining Pandora, I had senior management positions at 8 Tracks, SuperBetter Labs, and MIMA Music, and I also served as consultant with the Boston Consulting Group. I received my law degree from Stanford University Law School in 2007 and my undergraduate degree from Princeton University in 2003.

2. I submit this Written Supplemental Remand Testimony to respond to inaccurate, incomplete, and misleading testimony concerning Pandora submitted by the Copyright Owners in their Reply Remand Submission. Specifically, I respond to the Remand Written Rebuttal Testimony of Dr. Jeffrey A. Eisenach (“Eisenach RWRT”) to address his testimony concerning: (1) the sound recording royalty rates paid by Pandora between 2017 and September 2020; and

(2) Pandora’s financial performance during the period when the now-vacated mechanical royalty rate increases awarded at an earlier stage of this proceeding were in effect.

The Sound Recording Royalty Rates Paid By Pandora for Its Interactive Service Offerings

3. In the Written Direct Remand Testimony submitted by my colleague George White (“White WDRT”), he addressed a key premise of the majority opinion in the vacated determination in his proceeding: that if the Judges raised mechanical rates paid for musical works, the record companies would respond by lowering the royalty rates charged for sound recordings. That prediction, he explained, [REDACTED]

[REDACTED]

[REDACTED]”

White WDRT at ¶ 4 (emphasis in original).

4. In his rebuttal testimony, Dr. Eisenach contends that Mr. White’s testimony was incorrect. He presents royalty payment data purportedly demonstrating that Pandora’s sound recording rates dropped after the *Phonorecords III* rates were announced, implying that the so-called “see-saw” effect on which the Majority relied in setting the now-vacated rates is real and did in fact occur. Eisenach RWRT Fig. 6. But it is Dr. Eisenach who has it wrong.

5. To start, Dr. Eisenach’s testimony shifts the conversation to Pandora’s *effective* royalty rates, not the headline rates Mr. White addressed in his testimony. It is indisputable that our headline rates for sound recordings remained the same in the wake of the *Phonorecords III* determination, and that [REDACTED]

[REDACTED].

6. It is true that [REDACTED]. But the reason for that had nothing whatsoever to do with *Phonorecords III* or any “see-saw” between musical work

and sound recording rates. As I will explain in what follows, the decline was the result of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

7. As Pandora witnesses have previously explained, prior to launching its interactive service offerings in 2017, Pandora relied on the compulsory license to utilize sound recordings in noninteractive webcasting. *See, e.g.,* Herring WDT ¶ 48; White WDRT ¶ 3. The expansion of Pandora’s offerings to include interactive features required direct licenses from record companies, and minimum guarantees were a condition of obtaining those direct licenses from the three major record companies (Universal Music Group, Sony Music Entertainment, and Warner Music Group (collectively, the “Majors”)) and from Merlin.

8. Because Pandora was just launching its interactive tiers, the minimum guarantees that the Majors and Merlin required necessarily were based on Pandora’s estimates as to how many of our free-tier users would upgrade to a subscription tier, and how many of our (then non-interactive) Pandora One subscribers would transition to the mid-tier Pandora Plus, or upgrade to the fully interactive Pandora Premium during the two-year term of the agreements. Given the uncertainty, the minimum guarantees were set at a level low enough that they would not become operative or affect the royalties paid under the agreements unless Pandora fell far short of its

expected growth and generated far lower royalties under the headline royalty prongs than expected. As noted in a contemporaneous document, Pandora could “ [REDACTED] [REDACTED] [REDACTED].” PAN Suppl.

Rem. Ex. 001 at 2.

9. [REDACTED] Our models at the time the initial licenses with the Majors and with Merlin were negotiated projected that Pandora would have [REDACTED] Premium subscribers and [REDACTED] Plus subscribers [REDACTED]. But, [REDACTED] subscribers to our Premium service and [REDACTED] subscribers to our Plus service [REDACTED], the amounts owed in royalties [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

10. When it came time to renew the agreements, we and our licensing counterparts at the Majors and Merlin agreed to [REDACTED]

[REDACTED]

[REDACTED]. In one case, [REDACTED]

[REDACTED]. As a result, our monthly payment obligations thereafter were [REDACTED]

[REDACTED] This, in turn, caused our [REDACTED]

[REDACTED].

11. To be clear, contrary to the conclusion Dr. Eisenach suggests, the [REDACTED] [REDACTED] between January 2018 and September 2020 had nothing whatsoever to do with the *Phonorecords III* determination or our mechanical rates, much less any “see-saw” effect. As Mr. White noted in his testimony in this proceeding, our entreaties to secure rates on that basis were flatly and uniformly rebuffed. White WDRT at ¶¶ 4, 5. [REDACTED]

[REDACTED]

[REDACTED] when we renegotiated renewals with the Majors and Merlin following the expiration of our initial licenses with those companies. I provide additional detail on how this played out with each of those licensors below.

A. Warner Music Group

12. Our original agreement with Warner Music Group (“WMG”), signed in September of 2016, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

13. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

B. Sony Music Entertainment

14. Our original September 2016 agreement with Sony Music Entertainment (“Sony”)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

15. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

C. Universal Music Group

16. Our original interactive license with Universal Music Group (“UMG”) called for

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. *See* UMG Amendment No. 4,

Feb. 6, 2018.²

17. While we [REDACTED]

[REDACTED]

[REDACTED]

¹ [REDACTED]

² Mr. White discussed this amendment in his testimony. He noted that [REDACTED]

[REDACTED]

White WDRT ¶ 21.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

D. Merlin

18. Pandora's initial license agreement with Merlin [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

19. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

20. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

E. Summary

21. Absent the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Pandora’s Interactive Service Offerings Did Not “Grow and Prosper”
Under the Phonorecords III Rates”**

22. Dr. Eisenach claims Pandora has “continued to grow and prosper under the Phonorecords III Rates.” Eisenach RWRT ¶ 52. None of the misleading measures he presents to

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support this contention actually do so. Dr. Eisenach first claims that Pandora's total revenue grew 23% from 2017 to 2020. Eisenach RWRT ¶ 52. But Pandora's total revenue is dominated by activities that fall outside interactive streaming, including its non-interactive free tier and the off-platform services it provides to third-parties like SoundCloud: Dr. Eisenach's own figures show that the ad revenues that Pandora earned from its *noninteractive* free tier are vastly greater than the revenues that Pandora has earned from subscriptions to Pandora Plus and Pandora Premium.

23. Perhaps recognizing the irrelevance of Pandora's *total* revenues to the point he is trying to prove, Dr. Eisenach next observes that Pandora's subscription revenues increased between 2017 and 2020, from \$315 million to \$515 million. But this observation also fails to support his point. To start, almost all of the revenue increase he identifies occurred from 2017 to 2018 (from \$315 million to \$478 million). But that simply reflects the fact that Pandora did not even begin rolling out Pandora Premium until March 15, 2017, and had fewer than a million subscribers until October of that year, making 2017 an incomplete and highly misleading baseline against which to measure growth. Indeed, Dr. Eisenach's own Figure 13 shows that Pandora's subscription revenues dropped in 2019, the first full year after the now-vacated *Phonorecords III* rates came into effect. More fundamentally, Dr. Eisenach's focus on revenue alone—as opposed to measures of profitability that take cost into account—is a misleading measure of health of the business. While Pandora does not separately track profitability for its two subscription services, our adjusted EBITDA for the company overall was negative every year between 2017 and 2020—hardly the sign of a company that is “growing and prospering.”

24. Finally, Dr. Eisenach's observations regarding Pandora's gross margins (*see* Eisenach RWRT Fig. 14) suffer both of the flaws just discussed: they reflect margins for

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Pandora's entire business (not just the interactive services at issue here), and they reflect only a subset of our costs, not the bottom-line health of the subscription businesses at issue here based on all relevant revenue and costs.

PAN Suppl. Rem. Ex. 1

RESTRICTED DOCUMENT

Subject to Protective Order in Docket No. 16-CRB-0003-PR

(2018-2022) (Remand)

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**DECLARATION AND CERTIFICATION OF DAVID J. BIER
REGARDING RESTRICTED MATERIAL**

(On behalf of Pandora Media, LLC)

1. I am counsel for Pandora Media, LLC (“Pandora”) in the above-captioned case. I respectfully submit this declaration and certification pursuant to the terms of the Protective Order issued July 27, 2016 (the “Protective Order”). I am authorized by Pandora to submit this Declaration on Pandora’s behalf.

2. I have reviewed the Written Supplemental Remand Testimony of Jonathan Barnes and the Exhibit appended thereto. After consultation with my client, I have determined to the best of my knowledge, information and belief that the Testimony and Exhibit contain information that Pandora has designated as “Restricted” under the Protective Order (the “Protected Material”). The Protected Material is shaded in grey highlighting in the Restricted filing of the Testimony and is fully redacted in the Public filing of the Testimony. The Protected Material includes, but is not limited to, (a) financial and royalty payment information that is not available to the public and is highly competitively sensitive; and (b) highly confidential internal business information that is proprietary, not available to the public, and commercially sensitive.

3. If this contractual, financial, and royalty information were to become public, it would place Pandora at a commercial and competitive disadvantage, unfairly advantage other

parties to the detriment of Pandora, and jeopardize its business interests. Information related to Pandora's confidential financial information and the royalties it pays to third-party content providers could be used by Pandora's competitors, or by other content providers, to formulate rival bids, bid up Pandora payments, or otherwise unfairly jeopardize Pandora's commercial and competitive interests.

4. The contractual, financial, and royalty information described in the paragraphs above must be treated as Restricted Protected Material in order to prevent business and competitive harm that would result from the disclosure of such information while, at the same time, enabling Pandora to provide the Copyright Royalty Judges with the most complete record possible on which to base their determination in this proceeding.

Pursuant to 28 U.S.C. § 1746, I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: November 15, 2021
New York, NY

/s/ David J. Bier
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Proof of Delivery

I hereby certify that on Monday, November 15, 2021, I provided a true and correct copy of the Written Supplemental Remand Statement of Pandora Media, LLC (PUBLIC) to the following:

National Music Publishers' Association (NMPA) et al, represented by Benjamin Semel, served via ESERVICE at Bsemel@pryorcashman.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Nashville Songwriters Association International, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Google LLC, represented by David P Mattern, served via ESERVICE at dmattern@kslaw.com

Spotify USA Inc., represented by Richard M Assmus, served via ESERVICE at rassmus@mayerbrown.com

Amazon.com Services LLC, represented by Scott Angstreich, served via ESERVICE at sangstreich@kellogghansen.com

Signed: /s/ Todd Larson